

January 29. 1766.

ANSWERS

F O R

Captain John Forbes of New, factor upon the annexed estate of the late Earl of Cromarty,

T O



The PETITION of Sir John Gordon of Invergordon, Baronet,

THE estate of Cromarty, lying partly in the shire of that name, and partly in Ross-shire, became forfeited to his Majesty by the attainder of George late Earl of Cromarty; the estate of Lovat, lying in the county of Inverness, became also forfeited by the attainder of the late Lord Lovat; and both these estates, together with some others in the same situation, were, by statute 25th Geo. II. annexed unalienably to the crown.

By the same statute it was provided, That the rents of these estates should be applied towards civilizing the highlands and islands of Scotland, and promoting good government, industry, and manufactures, among the inhabitants, under the direction of trustees or commissioners to be appointed by his Majesty; which appointment soon after took place; and factors were named on the said estates, by the trustees, under the authority of the act of parliament.

The respondent has, for a number of years past, been employed

ployed as factor for the public on the estates of Cromarty and Lovat; and, in that capacity, he has likewise been in use to be appointed one of the commissioners of supply in the counties of Cromarty, Ross, and Inverness, though he has not an inch of property in any of these counties. It has been the practice in many counties of Scotland, and more particularly in the shire of Cromarty, to name the factors of private gentlemen in the commissions of supply; but it was reckoned still more material, that the estates forfeited and annexed to the crown, and appropriated to public uses, should have a representation among the commissioners, to attend to the interests of his Majesty and of the public, in laying on and proportioning the land-tax, dividing valuations, executing the laws with regard to highways, bridges, and ferries, and other business of that kind, which is usually transacted in county-meetings.

Anno 1755. By an act passed in the 28th year of his late Majesty, the following persons were named commissioners of supply for Cromarty. " Sir John Gordon of Invergordon, Baronet, Charles Hamilton-Gordon of Newhall, Esq; William Urquhart of Meldrum, Esq; Roderick Macleod of Cadboll, Esq; and the Chamberlains or factors of the above four, *the factor on the estate which belonged to George late Earl of Cromarty*, Adam Gordon of Ardoch, Esq; Charles Urquhart of Greenhill, Charles Urquhart of Braelangwell, William Anderson of Udal, John Davidson of Drumhall."

Anno 1757. In the 31st year of his late Majesty, there was a new appointment of commissioners for executing the supply-act of that year. The nomination of Cromarty was in these words. " The Right Honourable Kenneth Mackenzie of Seafort, commonly called Lord Fortrose; Sir John Gordon of Invergordon, Baronet, or his factor, in his absence; Charles Hamilton-Gordon of Newhall, Esq; Advocate, or his factor, in his absence; Roderick Macleod of Cadboll, Esq; or his factor, in his absence; Adam Gordon of Ardoch; William Urquhart of Cromarty; Charles Urquhart of Braelangwell; John Gorry, principal Commissary

“ Commissary for the shires of Ross and Cromarty; John Davidson of Drumhall; William Anderson of Udal; *Captain John Forbes of New, chamberlain for crown and public on forfeited annexed estate that was the late Earl of Cromarty's*; the factor on the sequestrated lands of Greenhill.”

These lists were given in by Sir John Gordon, who, at that time, represented the county in parliament; and the same persons were continued during the remaining years of that parliament, by a general reference in the supply-acts of each year to the nomination last recited.

By an act passed in the second year of his present Majesty's Anno 1762. reign, the following commissioners were named for the shire of Cromarty: “ Sir John Gordon, Baronet, or his factor in his absence; William Gordon of Newhall, William Urquhart of Cromarty, Adam Gordon of Ardoch, Charles Urquhart of Brae-langwell, Mr Leonard Urquhart clerk to the signet, Roderick Macleod of Cadboll, John Gorry principal commissary for the shires of Ross and Cromarty, John Clunes of Neilston, Henry Davidson of Tulloch, William Anderson of Udal, Robert Gordon of Haughs, Captain John Reid of Cromarty, Mr William Forsyth merchant in Cromarty, *Captain John Forbes of New, factor for the forfeited annexed estate of the late Earl of Cromarty.*”

And by the land-tax act of the present year, the same persons were again named, by a general reference to the act of the second of his Majesty.

Your Lordships will observe, that in the nomination 1755, the respondent is not named, but only described by his office, as factor on the estate of Cromarty. — In the two later nominations, he is indeed mentioned *nominatim*, but his office as factor on that estate is immediately subjoined, to show, that he was not appointed as *Captain Forbes of New*, but merely under the character and description of *factor on the annexed estate of Cromarty*. In the same way, in the additional nomination passed in 1763, he is appointed in Inverness-shire

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in this manner, " Captain John Forbes of New, factor of Lovat." From this it is plain, that he was appointed in Cromarty, as factor on the estate of Cromarty; and in Invernessshire, as factor on the estate of Lovat.

And what proves this to a demonstration, is, that in the very act of parliament 1762, where he is appointed for Cromarty by name, surname, and office, he is appointed for Ross-shire, by the description of his office only, in these words, " the factor for the forfeited estate of Cromarty for the time being " — At the same time, in Aberdeenshire, where his own estate lies, and where he has no factory, or other office, he is named simply in this manner, " Captain John Forbes of New."

In consequence of these nominations for the counties of Ross, Cromarty, and Inverness, the respondent thought himself intitled, and even obliged in duty, to give his assistance as a commissioner of supply in these counties, when occasion offered, though he had no property or possession within them. In Invernessshire, he has often been called upon to act, and has accordingly acted, without any objection to his title, or so much as suspecting that he was liable to any. In Cromarty he has had less occasion to act of late years; because it is a fact well known to the petitioner, that there has hardly been a meeting of the commissioners of that county from the year 1758, when it is admitted, he officiated without any objection, down to April last. — The business has gone on of course, and the collector has levied the supply from year to year in this small county, without any public meetings. — But the respondent was always ready to assist when occasion required. — On the 30th April last, he was called on as one of the commissioners of supply, to assist in executing the public business of the county: He attended accordingly, without suspecting that he was not duly qualified. And surely he had no reason to expect any objection from Sir John Gordon, who was the person that had put him
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on the rolls of supply, as factor on the estate of Cromarty, and who knew well, that he had no other qualification which could intitle him to be a commissioner of supply in that county.—Neither was any objection made to him at this meeting of the 30th April. — Sir John Gordon's nephew, Mr William Gordon, and his factor Mr John Gorry, were both present: They objected to the title of William Forsyth, another of the commissioners; but the respondent's title was acquiesced in, and the whole meeting concurred in electing him preses.

The petitioner talks of political jobs, and says, That the sole business of the meeting was, to take a petition under consideration for dividing the valuations of two estates, with a view of creating fictitious votes, to the prejudice of Sir John Gordon's political interest in the county; and that the public business was entirely neglected: and he even takes the liberty to insinuate, that the respondent came to the meeting, in order to serve a party, under promises of being indemnified in case he should be found liable in penalties.

The respondent knows of no political jobs that were meant to be carried on, far less was he in any such compact as is hinted at in the petition; and he begs leave to say, that it is not extremely becoming in this petitioner to indulge himself in such injurious suspicions of any gentleman. He is in a mistake, when he says, that no public business was transacted at the meeting. The first thing done, was to elect a collector for the ensuing year, and a clerk; thereafter they proceeded to elect a convener, when *the petitioner* was elected: " Thereafter there was an account given in, by Robert Gordon's order, of the cesses of the county of Cromarty for the
 " years 1763 and 1764; as also produced discharges for the
 " year 1763; and by which account it appears, that the cess
 " for the year 1764 is paid; but discharges for that year not
 " given in: therefore they ordained the said Robert Gordon
 " collector, to produce discharges of that year's cess against
 " next sederunt. As also produced a state of the window-

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“ lights preceding Whitsunday 1763 for said shire, the charge
 “ amounting to L. 161 : 11 : 1½, and produced receipts for
 “ L. 149 : 14 : 10. By which account it appears, that Mr
 “ James Munro minister of Cromarty is in arrear and unpaid,
 “ during said time, L. 8 : 12 : 1½, and L. 3 : 4 : 2 in the col-
 “ lector's hands, which make up the whole charge for said
 “ time.”

Thereafter the said John Gorry, and Charles Urquhart, bound themselves as cautioners for Robert Gordon the collector. “ Then the commissioners took under their consideration
 “ the situation of the roads in this county, and agreed, that
 “ there should be 10 d. Sterling levied out of every L. 100 of
 “ valued rent within the county, and appointed the collector
 “ of the cess to collect the same, which was to be applied for
 “ purchasing tools at the sight of George Munro of Pointy-
 “ field, Esq; William Gordon of Newhall, Esq; Mr William
 “ Forsyth merchant in Cromarty, and Mr Hugh Rose factor
 “ on the estate of Cromarty, who are likewise impowered to
 “ call out the inhabitants of town and country, in terms of
 “ the act of parliament, to work at said roads, and prosecute
 “ those that refuse.”

The very last thing done at the meeting, was to receive a petition in name of Patrick Lord Elibank, and William Fraser of Balnain; setting forth, That the said Patrick Lord Elibank had purchased the estate some time belonging to William Urquhart of Cromarty, and that he had since feued out certain parts of it; but that the whole being under a *cumulo* valuation, it became necessary to divide and value the several parcels of it, according to a proof of the real rent of each parcel. The commissioners found the desire of this petition reasonable, but delayed the further consideration of it to the 22d May then next; to which day they adjourned.

Accordingly, on the 22d May, they again met; and on that, and the two subsequent days, they, in consequence of the above petition, and another from Roderick Macleod of Cadboll,

Cadboll, who had likewise feued out parts of his estate, which were under a *cumulo* valuation, divided the valuations of these estates according to the regular and known forms of law. And as John Gorry, the petitioner's factor, had possessed himself of the old valuation-book, it became necessary for them to order a new valuation-roll to be made out, according to the alterations which had been made by them: And this being done, they gave the following directions as to levying the supply. "The commissioners ordain their collector and clerk
 "to state, assess, and certify the cesss and valuation of this
 "county, according to the preceding valuation, in time coming: And they further authorise, and impower Robert Gordon, their present collector and clerk, or his successors in
 "office, to receive and levy the cesss for this current year, pursuant to, and in terms of an act of the 5th of his present Majesty, intituled, *An act for granting an aid to his Majesty by a land-tax, to be raised in Great Britain, for the service of the year 1765*: And they decern and declare accordingly."

Such being the proceedings of the commissioners at these meetings, it is submitted how far the petitioner is intitled to say, that public business was neglected, and private political operations carried on.—The respondent knows of no law that obliges the commissioners to lay on or proportion the cesss at their first meeting.—The act of parliament makes the first quarterly payment no sooner than the 24th of June; and as in this case all the necessary orders to the collector were given at their adjourned meeting in May, this was certainly sufficient to answer all the purposes of the act of parliament: And indeed, as about one half of the county was to be subdivided, and valued of new, in consequence of the petitions above mentioned, the valuation-rolls could not well be adjusted, and the necessary directions given to the collector and clerk, any sooner.

The petitioner seems to have formed very strange ideas of the duty and powers of commissioners of supply. He talks
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as if the dividing a *cumulo* valuation was a thing illegal and criminal; and from his reasoning in the petition, it seems plain, that he thinks the commissioners of supply of this county have been highly presumptuous in interposing the aid of their office on this occasion, because the consequence may be, that the gentlemen who have thus had their valued rents divided, may be intitled to combat Sir John Gordon's natural interest in the county, by having as good a title to be admitted on the roll of freeholders as himself. — The respondent knows no law that can hinder any proprietor from insisting for a separate valuation of his lands, standing valued *in cumulo* : But he knows, that it would be most unwarrantable, and most illegal, in any commissioner or commissioners of supply, to reject such applications when made to them, merely because the consequence may be to hurt the supposed political interest of a third party. The valued rent is the rule by which all public burdens are paid, and even some valuable private rights are regulated and ascertained; such as the division of commonties, admission upon the roll of freeholders, certain casualties of superiority, &c. — The division therefore of *cumulo* valuations, is not only a thing authorised by the law, and which every proprietor is intitled to insist in ; but it is on many occasions a necessary act; and, next to the laying on the supply itself, it is the principal business of the commissioners of supply to regulate and divide valuations when required.

Neither the petitioner, nor the respondent, have any title to inquire, whether Lord Elibank holds the estate lately purchased by him, in trust for one gentleman, or for another? And as little right have they to inquire, what may be the private intentions or motives of any gentleman, in desiring to have his valuations divided? — It is enough to say, that an application was, *de facto*, made to the commissioners of supply, assembled at their general meeting: And had they refused, upon any motion from Sir John Gordon or his agents,
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to hear the petition, and give the usual orders upon it, they might have afforded a just ground of complaint against them for gross partiality, and refusal of justice.

Sir John Gordon, however, has been pleased to take offence at these commissioners for doing their duty; and as he imagined, upon rummaging through the act of parliament, that he had found out some objections to their titles, the present action was brought before your Lordships, concluding against them for penalties. — His motive for so doing, is fairly spoke out in p. 6. of the petition, *viz.* That he thought it a duty he owed to himself and his country, to bring these commissioners to punishment, because, upon applications made to them, they had assisted in dividing the valuations of certain estates in the county; the consequence of which might be, that other gentlemen who had as good estates as Sir John Gordon, would acquire as much political interest. — The respondent believes, it is the first time that such a reason was ever avowed in a court of justice. — The commissioners of supply have acted legally, and agreeable to their duty: But because Sir John Gordon's supposed *political* interest may be consequentially hurt, he will therefore show his resentment by distressing them with law-suits. If his duty to the public required of him to allow no commissioner to act who was not strictly qualified according to the letter of the law, why did he never complain of his own factor, Mr John Gorry, who has again and again acted without any qualification? and why is not his nephew, Mr William Gordon, arraigned before your Lordships, for having acted at a variety of meetings, since the 30th of April last, though a minor?

Is it consistent in Sir John Gordon, to object to the titles of one half of the constituent members of the meeting, 30th April, including the preses, and at the same time to acquiesce in their proceedings, and act under the authority of that meeting? — Your Lordships will be informed, that six persons only were present; three of whom, including Captain Forbes

the preses, have been complained of by Sir John; yet in consequence of his being elected *convener* at that meeting, Sir John will not deny, that in the month of September last, he called a meeting of the commissioners of supply; who accordingly met, adjourned themselves from time to time, and made a separate valuation of every farm of Sir John Gordon's estate, as well as of his nephew Mr Gordon's. — Whether all the commissioners that appeared at these meetings were strictly qualified, and whether any public business was performed by them, the respondent shall not give himself the trouble to inquire; and your Lordships will not probably learn from Sir John Gordon.

These observations, in point of fact, being submitted, the respondent shall now proceed to consider the question in law stated in the petition; which is threefold: *1mo*, Whether the respondent falls under the statute, requiring a certain qualification in land? *2do*, Whether he was not, at least *in bona fide*, to act? and *3tio*, How far Sir John Gordon is intitled to complain?

Point I.

The clause founded on by the petitioner is in these words:
 “ Provided nevertheless, that no person appointed by this act
 “ to be a commissioner for executing the several powers and
 “ things herein enacted, within any county or stewartry in
 “ that part of Great Britain called Scotland, shall be enabled
 “ or capable to be a commissioner of the land-tax, or for ex-
 “ ecuting the several powers and things herein enacted, who
 “ is not intitled in superiority or property, or possessed, as pro-
 “ prietor or liferenter, of lands, valued in the tax-roll of the
 “ county or stewartry where he acts, to the extent of L. 100
 “ Scots *per annum*, excepting the eldest sons and heirs-appa-
 “ rent of persons who are so intitled of lands, to the extent, and
 “ of the valuation aforesaid: And that every person who
 “ shall take upon him to act as a commissioner for executing
 “ any of the powers or things in this act contained, within
 “ any county or stewartry in Scotland, without being intitled
 “ in

“ in superiority or property, or in the possession of lands, in
 “ such county or stewartry, of the aforesaid value or extent,
 “ or without being eldest son and heir-apparent of a person
 “ so infest or in possession, shall forfeit the sum of L. 20 Ster-
 “ ling for every such acting, to be recovered by action, com-
 “ plaint or petition, in a summary way, at the suit of any *he-*
 “ *ritor* within the said county or stewartry, before the coun-
 “ ty or stewart court, or before the Lords of Session in Scot-
 “ land.”

This clause is pleaded on by Sir John, as containing a general and positive enactment, That no person named as a commissioner of supply for any county, under whatever designation or character, shall presume to act without having a qualification in land, to the amount of L. 100 Scots *per annum*; otherwise he shall be liable in the penalty.—And from this general proviso he says there is no exception, other than what is contained in a subsequent clause concerning bailies, &c.; but which makes no mention of factors upon forfeited estates.

The respondent must confess, that he always understood the above clause, though seemingly general, to apply only to heritors or land-holders named as such in the commissions of supply; and whatever way your Lordships may now explain the law, he believes, upon inquiry it will be found, that this has been an universal opinion in Scotland. — The great object of the legislature, in all the nominations of supply, either ancient or modern, has been, to authorise a sufficient number of persons to execute the business required by the statute; and with that view, every gentleman of any consideration, whether having an interest in land, or from his office, or other situation, connected with particular estates, or with the county in general, has been in use to be appointed.

In our Scots acts before the union, and even for a good many years after the union, no particular qualification in land was required; but heritors of the most trifling valuation were allowed to act, without being liable to any penalty:

ty: And besides those who were named as heritors, it was the uniform practice, to appoint a variety of others, who had a connection with the county, *ratione officii*, as factors, bailies, tutors, &c.; and sometimes there was an alternative nomination of the heritor himself, or some other person to act for him in his absence.

Thus, in the act of supply 1667 for the county of Elgin, Sir Ludovick Gordon of Gordonston is named, *or his brother Mr Charles*. In the nomination 1690, for Argyleshire, the following persons occur: "Neil Campbell tutor of Dunstaffnage; the tutor of Inverliver; Patrick Campbell, bailie to the Laird of Auchinbreck; the bailie or chamberlain of Kintyre; Archibald Campbell, chamberlain of Isla; the bailie of Jura; the Earl of Lauderdale's bailie for the time," &c. The nomination 1698 for Dumfriesshire contains "the Duchess of Buccleuch's chamberlain for the time; the Earl of Nithsdale's chamberlain for the time; and Dr William White, chamberlain to the Earl of Annandale." In 1704, the nomination for Kinross contains "*Mr Laurence Mercer, for the Lady Aldie*." In 1714, "Alexander Ross notary-public, chamberlain to Lieutenant-General Ross," is named for Rossshire. And a great variety of other instances of the same kind might be mentioned.

In the supply-act of the year 1722 appears for the first time the clause now founded on by the petitioner, subjecting those in a penalty who act without having a valuation to the extent of L. 100 Scots: After which follows a clause with respect to magistrates, in these words: "Provided nevertheless, that any provost or eldest bailie for the time being, of any royal borough, herein named a commissioner for putting this act in execution in any county or stewartry, shall be capable of acting as a commissioner in such county or stewartry, any thing herein contained to the contrary notwithstanding."

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The clause appointing heritors to have a certain valuation, took its rise probably from the like clause which had been usual in the English nominations ; but that it was meant to apply only to heritors, and that the clause with respect to the provost and eldest bailie of boroughs-royal was not intended as an exception of them alone, and to exclude all others from acting *virtute officii*, is plain from the different nominations contained in the very act of parliament 1722, where these clauses first make their appearance. For example: The nomination 1722 for the shire of Edinburgh contains, “ the sheriff-depute of Edinburgh, the eldest bailie of Musselburgh for the time, the eldest bailie of Dalkeith for the time.” The nomination for Renfrewshire contains, “ the eldest bailie of Paisley, the eldest bailie of Greenock, the bailie of Newark.” For the shire of Cromarty, “ the earl of Cromarty’s chamberlain” is in the nomination. For the shire of Argyle, “ Duncan Campbell bailie of Muckern, the bailies of Kintyre.” For the shire of Sutherland, “ the chamberlains for the time of the Earl of Sutherland, the Lord Strathnaver, and the Lord Rae.” For Caithness, “ Captain Monro of Westertoun, Alexander Henderson in Stempster, in Westertoun’s absence, the bailies of Wick for the time, the treasurer of Wick for the time, the bailies of Thurso for the time, Ulbster’s chamberlain, in his absence.” And in the nomination for the shire of Ross there are a number of chamberlains, bailies, &c.

Even in the latest nominations a variety of instances of the same kind appear. Thus, in the supply-act 1762, the nomination for Caithness ends with “ the Earl of Caithness’s chamberlain, and all tacksmen on the Earl’s estate for the time being.” Your Lordships can hardly suppose, that it could be the intention of the legislature, that these tacksmen should have qualifications as heritors. It is therefore plain, that a distinction has all along been understood to take place between heritors, and others appointed not *qua* heritors, but as having some other connection with the county ; and that the

clause requiring a certain valuation, was meant to apply only to the first class, and not to the latter; for we cannot suppose, that the legislature could mean to insnare people, by calling them to the execution of a public trust, and at the same time making it impossible for them to act without being liable in penalties. It is remarkable, that in this same clause the right of action for recovery of the penalties, is confined expressly to *heritors*; and part of the clause being thus limited, it seems natural to presume, that the other part, though conceived in more ambiguous terms, was not intended to be any broader.

Dict. voce
Commissioners
of supply.

Accordingly, in the case of Wick mentioned in the petition, this very point was *in terminis* decided. The clause with respect to magistrates, which was originally inserted in the supply-act 1722, and was continued in the same words without variation, till after the 1728, has already been recited. It mentioned only provosts and eldest bailies of boroughs-royal, and, according to the argument now maintained by the petitioner, ought to have been considered as an absolute exclusion of all others from acting without a qualification in land. Upon this idea Mr Sinclair of Freswick, in the year 1728, entered a complaint to your Lordships against the dean of guild of Wick, a borough-royal, and the bailies of Thurso, a borough of barony, for having acted as commissioners of supply in the county of Caithness, without being proprietors in the county; and the question was, Whether they had a title to act, merely in virtue of their nomination as dean of guild of Wick and bailies of Thurso, without any other qualification?

It was contended on the part of Freswick, the complainer, That the words of the act of parliament were express; and that no person could act as a commissioner of supply without a qualification, except provosts and eldest bailies of boroughs-royal, which necessarily excluded younger bailies and other office-bearers in boroughs-royal, and all magistrates whatever in boroughs of barony; the more especially as it was unreasonable

sonable in itself, that the whole magistrates of boroughs should be allowed to act as commissioners for counties, without having any landed interest or any connection with county-affairs.

It was answered on the part of the defendants, That they were appointed as commissioners in the acts of supply upon account of their offices, not as having a valuation in the county, but as persons clothed with authority, and who might be assisting in raising the supply; the legislature therefore could not mean, that they should have a qualification in land; and the clause requiring such a qualification, could only be understood to apply to heritors, not to those who were appointed *ratione officii*. They further argued, That the proviso thrown in concerning provosts and eldest bailies, which was in itself extremely indistinct, and seemed to have no reference to the preceding clause, was not properly an exception from the rule as to heritors, but a declaration thrown in *ob majorem cautelam*, that there might be no doubt of magistrates of boroughs-royal being intitled to act as commissioners in counties, if named in the acts of supply, but which did not exclude others in the same circumstances; and that accordingly it had been common for all kinds of magistrates, either in boroughs-royal or boroughs of barony, &c. to act as commissioners of supply, without having any valuation in land.

Upon this debate, which appears from the printed papers to have been conducted on the part of the complainer by counsel of the greatest eminence then at the bar, the dean of guild and bailies were assoilzied; the court being justly of opinion, that the qualifications mentioned in the act of parliament did not relate to those appointed *virtute officii*.

The principles of that decision apply directly to the present case. And indeed the petitioner does not seem to deny, that it is in point; but he endeavours to evade the force of it, by saying, that it is a single decision, in a political question; and that

that as the supply-acts are annual, the present question can only be determined upon the act of the present year.

But though the acts laying on the supply must be annually renewed; yet it is well known, that they are for the most part renewed without any variation, and that the new acts are generally copied from, or refer to the former ones, as to the powers and qualifications of the commissioners, and other matters contained in them. A decision therefore upon the qualifications of a commissioner for one year, will apply to the commissioners of another year, unless some special alteration is made by a subsequent statute; and in questions of this kind, where a penal statute is to be explained, and where the police of the country, as well as the interest of individuals, is deeply concerned, it is material that your Lordships should not vary your decisions.

The petitioner also observes, That in the supply-act subsequent to the 1728, it was thought proper to make the exception as to bailies, &c. a little broader, in order to comprehend the very case of that decision, which was a proof that the law was not thought to be thereby sufficiently ascertained, and still no exception was made of factors on forfeited estates. But this extension of the clause makes no difference in the present argument: the whole of it (if intended as an exception from the preceding clause) was quite unnecessary, and seems only to have been put in, and extended from time to time, *ob majorem cautelam*, like many other clauses in our statutes. At the same time the respondent cannot help hazarding a conjecture, that this clause was not in any shape intended as an exception from the general rule laid down with regard to heritors in the preceding clause; for it will be particularly remarked, that no mention whatever is made, either of qualifications or penalties, in this last clause. It is not said, that bailies, &c. though they have not L. 100 in the county, shall be allowed to act without being liable in the penalty. The clause contains only this simple proposition,

tion, That magistrates of boroughs shall be intituled to act as commissioners of supply in counties ; the reason of which proviso may probably have been, that as in Scotland the land-tax or cess is levied in boroughs by the magistrates alone, or by stent-masters appointed by them, and according to a different rule from what takes place in counties, it was at first doubted, whether magistrates could at all be allowed to act as commissioners of supply in counties, any more than heritors in the country could be allowed to interfere in laying on the cess in boroughs ; and in order to remove that doubt, the above clause was introduced into the act of parliament.

It has been usual, in the nominations for Sairlingshire, to appoint, among the commissioners of supply, the masters of Cowan's hospital, and the master of Spittal's hospital, and these masters are to this day in the uniform practice of acting as commissioners of supply, without any other qualification, though they are not contained in the supposed exception concerning magistrates, &c. In the nominations for fundry of the counties, the sheriffs-depute for the time being are appointed; and it is believed these gentlemen make no scruple to act *qua* such, without having any other qualification.

In many counties, and particularly in Cromarty, it has been the practice, to appoint the factors on private gentlemens estates, to act in the absence of their constituents. The legislature could never mean that these factors, named in this conditional manner, should be heritors, and as such have qualifications ; and accordingly it has been the established custom for them to act without any qualification ; and upon this footing, in particular, Mr John Gorry, the petitioner's factor, has upon many occasions acted in the county of Cromarty.

The case of the respondent is still more favourable than that of any private gentleman's factor ; for as the estate of Cromarty is forfeited, and belongs now to the public, there is no proprietor who can possibly attend the meetings of commissioners :

missioners ; the factor is the only person who can advert to the interest of that estate, and take care that too great a proportion of the tax shall not be laid upon it : It was therefore extremely proper that he should be named as a commissioner of supply, but the legislature could never mean to name him in any other capacity than that of factor, as it was well known that he had no other connection with the county, nor any interest whatever in it, either in property or superiority.

The petitioner says, That Captain Forbes, in the later nominations of this county, is appointed by name, surname, and title : That the mention which is made of his office is only meant as an additional designation ; and that had he been turned out of his office the next day after the act passed, he could still have acted at his peril. But the answer to this is plain : The petitioner is sufficiently designed by the appellation of *Captain John Forbes of New* ; under which designation he is named among the commissioners of supply in Aberdeenshire, where his estate lies ; and therefore, when in the same act of parliament he is named a commissioner of supply for Cromarty, under the description of “ Factor on the forfeited and “ annexed estate of the late Earl of Cromarty ;” and in Invernesshire, as “ Factor on the estate of Lovat ;” nothing can be plainer, than that in the one county he was meant to be named merely upon the account of his office as factor on the estate of Cromarty, and in the other county as factor on Lovat. In the nomination 1754 for Cromarty, he was not named at all, but described only as factor on the estate which belonged to the Earl of Cromarty. In the subsequent nominations, his name, as well as his office, has been inserted. But this cannot in reason make any difference ; more especially when it is observed, that to this very day, in the shire of Ross, where a part of the Cromarty estate lies, he is not named, but described only by his factory. Your Lordships cannot believe, that the legislature meant to appoint him in the one county as *Captain Forbes*, and in the other as *factor upon*

upon Cromarty, when the only connection which he has with either county is as factor on that estate. Neither can you believe, that it was the intention of the legislature in the 1754, to make him a commissioner in Cromarty *virtute officii*, and in the 1765 to name him as an heritor in a county where it was well known that he was not an heritor, but where he still continued to serve the public in the same capacity as formerly. The conclusion therefore seems plain, that in the county of Cromarty, as well as that of Ross, he was appointed merely *virtute officii*; and that if he had been turned out of his office next day, he could have had no pretence for acting in either county.

Neither is there any similitude between the respondent's case and that of John Gorry, who is designed, *Principa! commissary of Ross and Cromarty*, or that of Captain James Monro, or the other persons mentioned in the petition. The designations under which these persons are named, are those under which they are commonly known in the country; and seem only to have been meant as descriptive of the persons who were thus appointed: whereas nothing can be clearer, than that the respondent was made a commissioner of supply in the counties of Cromarty and Ross, merely upon account of his office.

And if your Lordships are satisfied, that it was not the meaning of the legislature to require a landed qualification in those appointed, merely on account of their offices, you will of course assilzie the respondent. It has not been the practice of this court, in explaining the law, to give force to mere words, contrary to obvious intention; and there is less reason for doing so in applying penalties, than in any other case whatever. The supply-acts are in many particulars not very carefully penned; for example, it has long been a dispute, and to this day it is an undetermined point, what number of commissioners make a quorum by these acts. This is a matter which has been left to practice to ascertain; and those who
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have the framing of the supply-acts, have never yet thought it proper to throw in an express clause, removing the doubt. In the same way, the clause now in question, when compared with the other clauses in the act, and particularly with the nominations themselves, is at best indistinct and obscure; and it belongs to your Lordships, as a court of law and equity, to explain it, according to what appears to be the intention and view of the legislature.

Point. II.

But, 2^{dly}, supposing your Lordships, upon an attentive consideration of the clause, should now incline to think, contrary to the opinion hitherto universally received, that even those named *virtute officii* fall under the rule as to heritors; yet the circumstances that occur in his favour, ought certainly to relieve him from penalties; and so it is most justly found by the interlocutor under review. The petitioner says, "That no person can be *in bona fide* who transgresses a public law; that ignorance of the law is no excuse in any case, far less in a case of this kind, where the reason of the respondent's acting was to lend his assistance in a political job; and that his ignorance was extremely gross, as it was the ignorance of a prohibition contained in the very commission under which he acted." It is further said, "That, by bringing this complaint, the petitioner has a *jus quæsitum* to the penalties; and that your Lordships can only determine the fact, whether the person complained of has or has not counteracted the law."

The petitioner's reasoning might have been just, had it been an established point in the law and practice of this country, That persons named in the commissions of supply *virtute officii*, were liable in penalties if they acted without having a qualification in land. But the respondent begs leave to deny, that it was a fixed point, either by the statute itself, by the decisions of this court, or in the general opinion and belief of the country. He does not pretend to say, that ignorance of the law is an excuse; or that any person who transgresses

transgresses a clear public statute, can be presumed to be *in bona fide*: but what he does humbly maintain, is, That if he has acted against law in this case, he was misled by your Lordships decisions; he was misled by the general opinion of the country; he was deceived by the legislature itself.

He saw that he was appointed a commissioner of supply for this county, under a character which was totally inconsistent with the notion of his being an heritor, or having a valuation in the county. Could he possibly imagine, that the legislature meant to name him a commissioner of supply in the shires of Ross, Cromarty, and Inverness, upon account of his factories on Lovat and Cromarty; and at the same time lay him under an express prohibition to act without being liable in penalties, unless he could fall upon ways and means, not only to be factor upon these estates, but also to acquire the property of them to a certain extent? a thing which was impracticable. Did he not also see, that in the case of Wick, your Lordships expressly determined this point, That persons called *ratione officii*, were intitled to act without any other qualification? And is it not certain, that in every county in Scotland, more especially since that decision was pronounced, a variety of persons have been in use to be named in the supply-acts *virtute officii*? and that they have been in the uniform practice of acting without any other qualification, in the firm opinion and belief, that they could not be liable in penalties?

The petitioner says, That Captain Forbes appears to have taken advice before he acted; from which it would seem, that he was diffident of his title.

When he came to the meeting of the 30th April, he neither took any advice, nor was diffident of his title: he had acted before that time, on many public occasions, both in Cromarty and Inverness, without the least objection to his title, and without suspecting, that it was liable to any; and he was allowed to act at that meeting of the 30th April, and

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Answer.

even elected preses, without any objection. — On the 22d May he was again called on by his duty to attend the meeting of commissioners; and it was *then*, for the first time, he understood, that Mr Gorry, the petitioner's factor, was to object against him. — Before the meeting, he went aside with a gentleman who used to do some business for him as his writer or attorney. and asked him, whether he thought there was any thing in the objection? They both agreed, in thinking it extremely clear, that he could act, as factor on the estate of Cromarty; as it was in that capacity that he was named in the statute; and as he had been in use to act in that capacity without any challenge; and they even thought that he could not be answerable to his constituents, if he did not attend such meetings when called on. — Accordingly it appears, from the minutes of that sederunt, that Mr Gorry having stated his objections against Captain Forbes, as wanting a qualification, Captain Forbes answered, " That he apprehends, *ex officio*, as factor on the annexed estate of Cromarty, he is intitled to vote as a commissioner of supply in this county; and that there was no objection made to his vote at the meeting of the 30th of April last, or at any former meeting."

The respondent submits to your Lordships, from the whole circumstances, whether there was here any wilful transgression of the law? — When an act of parliament inflicts penalties, it inflicts them by way of punishment for a transgression: And surely it would be against justice for any court to apply the punishment, where there was no intention to transgress. — Your Lordships cannot punish, or inflict penalties beyond the statute which has introduced them. But as the *interpretes equi et boni*, you certainly can mitigate, or refuse penalties, even upon an act of parliament, where you are satisfied, from the circumstances of the fact as brought in evidence before you, that the party has not justly incurred them.

The observation, That the petitioner has a *jus quasitum* to the

the penalties, proceeds on a *petitio principii*.—The respondent does admit, that if he has at all incurred these penalties, and if your Lordships are to award them, Sir John Gordon has the only right to them, because he was the first and *only* complain-er; but what he humbly contends is, that he has incurred no penalties, either to Sir John Gordon, or to any other person. The case put, of a shipmaster importing prohibited goods from a pretence of ignorance of the statute, is no way similar to the present. Where a person, with a view to his private advantage, imports uncustomed goods, against a clear revenue statute, he does it at his risk; and the jury, in case of detection, must condemn the goods; and no pretence of ignorance can be pleaded in excuse; because the law is presumed to be known to every one. But here the respondent does not plead any ignorance of the statute; he admits that he saw the statute before him, and from that very statute, he had probable grounds to believe, that he was intitled, and that it was his duty, as a servant of the public, to act as he did. The very law on which he is prosecuted, brought him into the situation which occasioned the prosecution. The meaning of it is at best obscure; and though it should now appear, that he was mistaken in his notion of the law, your Lordships will hardly think it proper to punish him for an error in judgment; more especially, as it was an error founded in the practice of the country, and in the decisions of your Lordships. The respondent shall agree with the petitioner in considering your Lordships as a jury in this matter; but he hopes you will at least exercise the same power which every common jury of this country assumes, of not only determining facts, but judging of the import of these facts; and that you will return a verdict, *Guilty*, or *Not guilty*.

As to the observation, That the respondent deserves no favour, because he assisted in the division of valuations, which was done with a political view: This has already been sufficiently answered. The respondent neither had, nor has any concern.

concern whatever in the politicks of the county; he was called on as a commissioner of supply, to execute the business of the statute. The public business was accordingly carried on in the same manner as usual: And there cannot be a doubt, that one of the chief branches of the duty of commissioners is, to divide valuations, when application to that purpose is made to them. The respondent is not conscious, that any thing unfair or irregular was intended; every thing was carried on according to the usual and established forms: And if he were to be found liable in the several penalties contained in a list subjoined to the petition, for concurring with the other commissioners in doing what their duty required of them, he cannot help saying, that his case would be particularly hard.

The respondent might even mention cases where the only excuse was *ignorantia juris*; and yet your Lordships, upon the circumstances of the case, relieved from statutory penalties. One of these is abridged in the Dictionary in these words.

Dict. Decisions, title *bona et mala fides*.

"The managers of the manufactures in Edinburgh having required a bailie's concurrence at nine o'clock at night in winter, for searching for prohibited goods hid in two houses that were private ones, and upon his delay taking instruments, and giving in a complaint to the Lords, founded upon the 8th and 12th acts of parliament 1700, the Lords found, that in this circumstantiate case, the bailie had not obeyed the act of parliament; for they thought that magistrates might be required to give their concurrence at any time, whether by day or by night, except from ten at night to five in the morning; and found, that the informers were not bound to describe the houses, inhabitants, or masters where they craved the search to be made: but the bailie was nevertheless affoizied from the fine, because of his *probabilis ignorantia juris*;" Fount. 30th November 1703, Fairholm *contra* Warrender. The argument used by the bailie, as reported by Lord Fountainhall, was in these words, "That he had acted *bona fide*, and by probable ignorance, seeing the clause of this new act of parliament

“parliament was dubious, and he might rationally stumble, especially having the town’s assessors advice for him.” And the interlocutor of the court is said by his Lordship to have been as follows. “The Lords assilzied the bailie from the fine of 500 merks imposed by the law, and found his excuse relevant as to bygones; but expected these acts would meet with punctual execution hereafter.”

The present case does not rest merely upon *ignorantia juris*, as has been fully explained, but upon a variety of other circumstances, from which it appears, that the respondent had the best reasons for supposing that the law was in his favour.

Lastly, The respondent must still be allowed to think, that Sir John Gordon is *personally* barred from insisting in this complaint. It is certain, that all the nominations for the county of Cromarty, from the 1754 to the 1761, when he represented that county in parliament, were devised or given in by him. The same thing must be admitted with regard to those from 1743 to 1747, while Sir John was likewise member for the county. All these nominations contain, not only the factor on the estate of Cromarty, but his own factor “to act in his absence,” and his brother’s factor to act in absence of his brother. The nominations, indeed, from the 1747 to the 1754, and in the present parliament, have been given in by Mr Campbell of Calder, the member for the alternate county of Nairn; but even these have been in use to be suggested by Sir John Gordon, the former member of the other county, as is usual in such cases; at least the nomination now in question was entirely directed by him: And therefore, if the respondent has been brought into that situation, that he has incurred penalties by acting as a commissioner of supply in Cromarty, he owes it entirely to Sir John Gordon, who put him into the lists of supply for that county, under the character of *Factor on the annexed estate of Cromarty*, well knowing that he had no other connection with the county, and that he had not an inch of

of property in it. And such being the case, your Lordships will judge, how far that very person who laid the snare for him is intitled to sue him for the penalties.

It will further be considered, how far Sir John Gordon, after having acquiesced in the proceedings of the meeting 30th April, at which Captain Forbes acted as preses, by accepting of the office of convener conferred on him by that meeting, and assuming to himself the right of acting in that character on a variety of occasions, can now be allowed to say, that one half of the commissioners at that meeting, and particularly their preses, had no qualification. And upon the whole of these grounds, it is not doubted that your Lordships will adhere to your interlocutor, and assilzie the respondent.

In respect whereof, &c.

ILAY CAMPBELL

